71-1596

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 71-

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED:	
I. Whether an order of the Interstate Commerce Commission, authorizing a railroad in reorganization to abandon a portion of its line, is reviewable in a plenary action before a three-judge district court under the Urgent Deficiencies Act (28 U.S.C. 2321-25), or must the I.C.C.'s decision be reviewed either by or upon consent of the reorganization court in the railroad's reorganization proceeding?	2
II. Whether a railroad reorganization court may direct the temporary suspension of railroad operations for a portion of the railroad pending final decision by the Interstate Commerce Commission on the carrier's application to abandon the portion of railroad	2
STATUTES INVOLVED	3
STATEMENT	3
Proceedings in the District Court	4
Proceedings in the Court of Appeals	4
Proceedings in the Supreme Court	5
ARGUMENT	6
I. THE REORGANIZATION COURT IS WITHOUT JURISDICTION TO REVIEW ABANDONMENT DECISIONS OF THE INTERSTATE COMMERCE COMMISSION OR TO PREVENT REVIEW BEFORE A STATUTORY THREE-JUDGE DISTRICT COURT	7
II. THE REORGANIZATION COURT IS WITHOUT JURISDICTION TO DIRECT THE TEMPORARY SUSPENSION OF PART OF A RAILROAD'S OPERATIONS	10

CONCLUSION 13

APPENDIX A

Order No. 445 of CNJ Reorganization Court 1a

Order No. 451 of CNJ Reorganization Court 3a

Opinion of U.S. Court of Appeals re Order No. 445 . . . . . 5a

Opinion of U.S. Court of Appeals re Order No. 451 . . . . . 7a

I.C.C. Announcement of Lehigh Valley Temporary Authority 9a

Judgment of U.S. Court of Appeals re Order No. 445 . . . . . 10a

Judgment of U.S. Court of Appeals re Order No. 451 . . . . . 12a

APPENDIX B–Statutes Involved 1b

TABLE OF CITATIONS

Cases:

Baker v. Pennsylvania, 401 U.S. 902 (1971) 9

Callaway v. Benton, 336 U.S. 132 (1949) 7

Carroll v. President and Commissioners of Princess Ann, 393 U.S. 175 (1968) 12

Chesapeake & O. Ry. Co.–Control–Western Maryland Ry. Co., 328 I.C.C. 684 (1967) 6

Chicago & N.W. Ry. Co. v. United States, 52 F. Supp. 65 (N.D. Ill. 1943), Aff'd 320 U.S. 718 (1943) 9

Commonwealth of Pennsulvania v. Interstate Commission and United States (Civil No. 71-416, U.S.D.C.–M.D.Pa.) 4

El Dorado Oil Works v. United States, 328 U.S. 12 (1946) 7

In Re Boston and Maine Corporation, 317 F. Supp. 1249 (D. Mass. 1970) 8

In Re Fonda, J. & G.R. Co., 95 F.2d 397 (2d Cir. 1938) 8

In Re Missouri Pac. R. Co., 93 F. Supp. 852 (E.D. Mo. 1950) 9

In Re New York, New Haven & Hartford Railroad Co., 289 F. Supp. 451 (D. Conn. 1968) 11

In Re Penn Central Transportation Company, 329 F. Supp. 387 (E.D. Pa. 1971) 9

In Re Penn Central Transportation Company, 325 F. F. Supp. 302 (E.D. Pa. 1971) 11

In Re Penn Central Transportation Company, 446 F.2d 1109 (3rd Cir. 1971), cert den. ___ U.S. ___, 92 S.Ct. 943, 30 L.Ed.2d 787 (1972) 9

Moore v. Ogilvie, 394 U.S. 814 (1969) 12

Myers v. Jay Street Connecting R.R., 259 F.2d 532 (2d Cir. 1958) 11

New Haven Inclusion Cases, 399 U.S. 392 (1970) 9, 11

New York Central Railroad Company v. United States, 201 F. Supp. 958 (S.D.N.Y. 1962) 11

Palmer v. Massachusetts, 308 U.S. 79 (1939) 9, 11

Pennsylvania v. United States (No. 70-1156, W.D. Pa.) vacated as moot 401 U.S. 902 (1971) 9

Pennsylvania R. Co.–Merger–New York Central R. Co., 327 I.C.C. 475 (1966) 6

Penn Central Merger Cases, 389 U.S. 486 (1968) 6

Reading Co.–Purchase–Lehigh & S.R. System, 317 I.C.C. 633 (1963) 6

Schwartz v. Bowman, 244 F. Supp. 51 (S.D.N.Y. 1965), aff'd sub nom. Annenberg v. Allegheny Corp. 360 F.2d 211 (2d Cir. 1966), cert. den. sub nom. Schwartz v. Eaton, 385 U.S. 921, (1966) 8

Smith v. Hoboken R. Co., 328 U.S. 123 (1946) 10, 11

Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911) 12

Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F.2d 387 (5th Cir. 1969), cert. den. 398 U.S. 910 (1970) 8

Thompson v. Texas Mexican R. Co., 328 U.S. 134 (1946) 7,11

Warren v. Palmer, 310 U.S. 132 (1940) 10

IN THE

Supreme Court of the United States

No. 71-

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, and United Transportation Union,[1] respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 10, 1972.

OPINIONS BELOW

Orders No. 445 and 451 of the reorganization court for The Central Railroad Company of New Jersey

[1] A labor organization representing the majority of train service employees of The Central Railroad Company of New Jersey (CNJ).

(CNJ),[2] are not reported. (App. 1a-4a). The opinions of the U.S. Court of Appeals for the Third Circuit, entered March 10, 1972, are not reported. (App. 5a-8a). The judgments of the Court of Appeals are set forth in the Appendix (App. 10a-13a).

JURISDICTION

The judgments of the U.S. Court of Appeals for the Third Circuit were entered March 10, 1972. (App. 10a-13a). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1), 2101(c).

QUESTIONS PRESENTED

1. Whether an order of the Interstate Commerce Commission, authorizing a railroad in reorganization to abandon a portion of its line, is reviewable in a plenary action before a three-judge district court under the Urgent Deficiencies Act (28 U.S.C. 2321-25), or must the I.C.C.'s decision be reviewed either by or upon consent of the reorganization court in the railroad's reorganization proceeding?

2. Whether a railroad reorganization court may direct the temporary suspension of railroad operations for a portion of the railroad pending final decision by the Interstate Commerce Commission on the carrier's application to abandon the portion of railroad.

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[2]No. B 401-67, U.S.D.C.-D.N.J. *In Re The Central Railroad Company of New Jersey.* Order No. 445 was filed December 20, 1971; Order No. 451 was filed January 11, 1972.

STATUTES INVOLVED

The statutes involved are section 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-(20), section 77(o) of the Bankruptcy Act, 11 U.S.C. 205(o), and sections 1398(a) and 2325 of the Judicial Code, 28 U.S.C. 1398(a), 2325, and are set forth in Appendix B.

STATEMENT

This petition involves two orders of a railroad reorganization court which were affirmed by the U.S. Court of Appeals. The Central Railroad Company of New Jersey (CNJ), a railroad in reorganization under section 77 of the Bankruptcy Act in the U.S. District Court for the District of New Jersey, on May 25, 1971 filed 30 applications with the Interstate Commerce Commission (I.C.C.) for permission to abandon various lines situated in the Commonwealth of Pennsylvania and in the State of New Jersey. The 30 applications[3] were filed under section 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-(20). Together, the proposals embrace 375.59 miles of CNJ operations, of which 235.75 miles are in Pennsylvania (constituting CNJ's entire operations in Pennsylvania), and 139.84 miles are in New Jersey.

Ten of these applications—5 in New Jersey and 5 in Pennsylvania—were summarily approved by the I.C.C. on August 20, 1971. An action for judicial review of these 10 abandonments was instituted pursuant to the three-judge court provisions of 28 U.S.C. 1336(a), 2284, 2321-25, in the U.S. District Court for the Middle District of Pennsylvania by Commonwealth of Pennsylvania, Pennsylvania Public Utilities Commission, and

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[3] Finance Docket No. 26659 and Sub-Nos. 1-29.

various labor organizations.[4] The operation of these 10 abandonment orders was stayed pending agency reconsideration, which petitions for reconsiderations were denied by final orders dated November 23 and served December 15, 1971.

The remaining 20 line abandonment applications were the subject of oral hearing by the I.C.C., which concluded December 14, 1971.

Proceedings in the District Court

The CNJ reorganization court held a hearing on December 15, 1971. The court directed CNJ's trustee to temporarily suspend on April 1, 1972 all operations in the Commonwealth of Pennsylvania, pending final decision by the I.C.C. on the abandonment applications. In addition, the court enjoined all state government agencies and other persons from instituting or maintaining any action or proceeding affecting the abandonment of operations in Pennsylvania in any other court, or without first obtaining leave of the CNJ reorganization court to do so. The court's formal order, No. 445, was filed December 20, 1971. (App. 1a-3a).

Later, on January 11, 1972, the CNJ reorganization court entered Order No. 451, authorizing CNJ's trustee to implement the 10 abandonment orders of the I.C.C. (App. 3a-4a).

Proceedings in the Court of Appeals

The Court of Appeals stayed the operation of Order No. 451, which otherwise would have permitted the 10 abandonments, and consolidated the appeals from both

[4]Civil No. 71-416, *Commonwealth of Pennsylvania, et al. v. United States and Interstate Commerce Commission* (U.S.D.C.-M.D.Pa.), filed September 24, 1971.

orders with two other orders.[5] There were a number of participants below.[6]

The Court of Appeals heard extensive argument. Its opinions and judgments were entered March 10, 1972, affirming the district court decisions in all respects. (App. 5a-8a).

Proceedings in the Supreme Court

The Court of Appeals on March 22, 1971, denied motions for stay of CNJ's temporary suspension of operations in Pennsylvania, scheduled to become effective April 1, 1972, and also denied a stay of the 10 abandonments earlier authorized by the I.C.C. Thereafter, applications were presented on March 23, 1971 to Mr. Justice Brennan by petitioners (A-987) and by Reading Company (A-988).

The I.C.C. the following day, March 24, 1972, issued emergency orders authorizing Lehigh Valley Railroad Company temporarily to take over all operations of CNJ throughout Pennsylvania as of April 1, 1972.[7] (App. 9a).

[5] Order No. 441 of the CNJ reorganization court, and Order No. 61 of the Lehigh Valley reorganization court. (Bank. No. 70-432, U.S.D.C.-E.D.Pa.)

[6] Parties filing briefs or memoranda in the U.S. Court of Appeals included CNJ, United States of America, I.C.C. (amicus), Reading, Lehigh Valley, State of New Jersey, Lehigh Coal & Navigation Company, Tenneco Chemicals, Inc. (amicus), Manufacturers Hanover Trust Company, 3¼% Mortgage Bondholders' Protective Committee, United Transportation Union, and jointly by Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission.

[7] Lehigh Valley has an application on file to acquire all of CNJ's operations in Pennsylvania upon abandonment by CNJ. Similar applications have been filed by Reading Company, owner of the

The Applications for Stay were referred to Mr. Justice Stewart, and by him denied on March 27, 1972.

ARGUMENT

The Third Circuit has decided important questions of federal law which conflict with applicable decisions of this Court, and which should be settled by this Court. A number of major eastern railroads are in reorganization under section 77 of the Bankruptcy Act, within the Third Circuit. Among these railroads are Penn Central Transportation Company (Bank. No. 70-347, E.D.Pa.), Lehigh Valley Railroad Company (Bank. No. 70-432, E.D.Pa.), Reading Company (Bank. No. 71-828, E.D.Pa.), and CNJ, the carrier involved in this petition for certiorari.

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fee of CNJ's line in Pennsylvania. *Reading Co.–Purchase–Lehigh & S.R. System*, 317 I.C.C. 633 (1963). Lehigh Valley is a subsidiary of Penn Central, the latter being required to maintain Lehigh Valley operational as a condition to consummation of the Penn-Central merger. *Pennsylvania R. Co.–Merger–New York Central R. Co.*, 327 I.C.C. 475, 554-55 (1966). Lehigh Valley petitioned for reorganization following Penn Central's entry into reorganization, pursuant to section 77(a) of the Bankruptcy Act, 11 U.S.C. 205(a), and requested reorganization as part of Penn Central's plan of reorganization, under the supervision of U.S. District Judge John P. Fullam. Reading has controlled CNJ for many years, and is itself part of the C&O-B&O system. *Penn-Central Merger Cases*, 389 U.S. 486, 519 (1968); *Chesapeake & O. Ry. Co.–Control–Western Maryland Ry. Co.*, 328 I.C.C. 684, 707-9 (1967). Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission oppose withdrawal by CNJ from Pennsylvania, but if such abandonment is permitted, prefer Reading's applications and strongly oppose that of Lehigh Valley.

I. THE REORGANIZATION COURT IS WITHOUT JURISDICTION TO REVIEW ABANDONMENT DECISIONS OF THE INTERSTATE COMMERCE COMMISSION OR TO PREVENT REVIEW BEFORE A STATUTORY THREE-JUDGE DISTRICT COURT.

The CNJ reorganization court's order requires that persons (other than federal agencies) seek its permission before suing to set aside I.C.C. line abandonment orders.[8] Yet it is clear from decisions of this Court that Congress did not give reorganization courts exclusive jurisdiction over all controversies that in some way may affect the debtor's estate. *Callaway v. Benton*, 336 U.S. 132, 142 (1949); *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134 (1946).

The Commission's decision to allow the 10 abandonments was entered under the provisions of the Interstate Commerce Act, and review of its decision must be in a statutory court composed of three judges. 28 U.S.C. 2321-25. Indeed, the Supreme Court decided this question in *Thompson v. Texas Mexican R. Co., supra*, a case involving a railroad in reorganization under section 77 of the Bankruptcy Act. The Court stated, 328 U.S. at 151, fn. 11:

> If the [abandonment] order of the Commission were challenged, its review could of course be had *only* in the manner provided by statute. See *El Dorado Oil Works v. United States*, 328 U.S. 12. (emphasis supplied)

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[8] The Court in fact denied permission to maintain the action in the Middle District of Pennsylvania on January 10, 1972, the day prior to entry of Order No. 451 which implemented the 10 I.C.C. abandonment orders.

Reference to the *El Dorado* case clearly indicates that orders of the I.C.C. are to be reviewed by a district court of three judges. 328 U.S. 12 at 19.

A statutory three-judge court is the exclusive and sole method for review of I.C.C. abandonment orders entered under section 1(18)-(20) of the Interstate Commerce Act. *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387, 398-400 (5th Cir. 1969), cert. den. 398 U.S. 910; *Schwartz v. Bowman*, 244 F. Supp. 51, 64-68 (S.D.N.Y. 1965), aff'd sub nom. *Annenberg v. Allegheny Corp.*, 360 F.2d 211 (2nd Cir. 1966), cert. den. sub nom. *Schwartz v. Eaton*, 385 U.S. 921.

Section 77(o) of the Bankruptcy Act provides that the trustee initially determine whether to apply for a line abandonment. The reorganization court is concerned solely with the financial advantages or disadvantages to the debtor. Public interest questions are for the regulatory agency. *In Re Fonda, J. & G. R. Co.*, 95 F.2d 397, 400 (2d Cir. 1938):

> . . . the District Judge need only consider the financial advantages or disadvantages to the debtor corporation's estate in the event that permission to abandon shall be granted by the appropriate regulatory bodies.

The court stated in *In re Boston and Maine Corporation*, 317 F. Supp. 1249, 1252 (D. Mass. 1970), that the reorganization court should be "concerned only with the economic effect of the abandonment on the debtor's estate and reorganization, and that questions of the effect on public interest are to be left to the Interstate Commerce Commission."

In an analogous situation, involving passenger train abandonments, the Third Circuit stated that "matters relating to train discontinuances are not ordinarily heard by the reorganization court." *In re Penn Central Trans-*

portation Company, 446 F.2d 1109, 1113 (3rd Cir. 1971), cert den. ___ U.S. ___ (1972). The District Judge in that case had distinguished orders of the I.C.C., which require review in a statutory three-judge court, from the situation under Rail Passenger Service Act of 1970,[9] where an order of the I.C.C. is not involved. *In Re Penn Central Transportation Company*, 329 F. Supp. 387, 389 (E.D. Pa. 1971). Further, a three-judge district court in the Third Circuit denied a motion by Penn Central's trustee to transfer a passenger train abandonment case to the Penn Central reorganization court. *Pennsylvania v. United States* (W.D. Pa. Civil No. 70-1156), vacated as moot sub nom. *Baker v. Pennsylvania*, 401 U.S. 902 (1971).

An exception to the rule that I.C.C. abandonment orders are reviewed in three-judge courts, is where the abandonments are considered by the I.C.C. together and as part of the plan of reorganization under section 77(e) and 77(f) of the Bankruptcy Act. *Chicago & N.W. Ry. Co. v. United States*, 52 F. Supp. 65 (N.D. Ill. 1943), aff'd 320 U.S. 718; *New Haven Inclusion Case*, 399 U.S. 392, 429 (1970); *In Re Missouri Pac. R. Co.*, 93 F. Supp. 852, 863 (E.D. Mo. 1950); cf. *Palmer v. Massachusetts*, 308 U.S. 79, 88 (1939). At the request of CNJ, the Commission has deferred hearings on CNJ's plan of reorganization, and has declined to consolidate the abandonments with the plan of reorganization.

Abandonment decisions of the I.C.C. have a national and widespread interest, and are not confined to the particular railroad proposing the abandonment. This is because the Nation's railroads offer a unified system of rail transportation, with standard track gauge, joint through rates, and interchange of traffic without transfer

[9] 45 U.S.C. 501.

of lading. Accordingly, the abandonment of a segment of CNJ in Pennsylvania will affect the national rail network.

If the ruling below is not reversed, it is anticipated that the Third Circuit will accord similar treatment to line abandonment decisions of the I.C.C. for other railroads. This would seriously impair the effective workings of the I.C.C., and would deprive the Commonwealth of Pennsylvania of an independent tribunal for review of line abandonment decisions.

The question presented is of pressing importance to the orderly administration of line abandonments between reorganization courts and the Interstate Commerce Commission, and the respective spheres of responsibility.

II. THE REORGANIZATION COURT IS WITHOUT JURISDICTION TO DIRECT THE TEMPORARY SUSPENSION OF PART OF A RAILROAD'S OPERATIONS.

The CNJ reorganization court was without authority to order CNJ's trustee to temporarily suspend operations in Pennsylvania on April 1, 1972. Such a suspension occurred on April 1, 1972, and was highly prejudicial to the outcome of the I.C.C. proceedings.[10] The court's order was an attempt to dictate the I.C.C. decision.

It is settled that a discontinuance of operation is an abandonment within the meaning of section 1(18)-(20) of the Interstate Commerce Act, and requires prior I.C.C. approval. *Smith v. Hoboken R. Co.*, 328 U.S. 123, 130 (1946); *Warren v. Palmer*, 310 U.S. 132, 137-38 (1940);

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[10] The I.C.C. on May 26, 1972 (served June 2) concluded to authorize CNJ's abandonment in Pennsylvania, subject to conditions. The I.C.C. order is not yet effective, is subject to petitions for reconsideration, and ultimate judicial review.

Thompson v. Texas Mexican R. Co., 328 U.S. 134, 144-45 (1946).

The courts will enjoin attempts to "temporarily suspend" on the ground of financial poverty. *Myers v. Jay Street Connecting R.R.*, 259 F.2d 532 (2d Cir. 1958); *New York Central Railroad Company v. United States*, 201 F. Supp. 958 (S.D.N.Y. 1962). To the extent that a temporary suspension of operation is governed by State law, the reorganization court cannot evade such law except as part of a complete plan of reorganization. *Palmer v. Massachusetts*, 308 U.S. 79, 88 (1939).

There is no finding below of an unconstitutional taking of property, but even if a finding were made, it would not authorize the suspension of a *portion* of a railroad operation, for that decision rests with the Interstate Commerce Commission. Questions of an unconstitutional taking of property are decided in connection with the plan of reorganization. *In Re Penn Central Transportation Company*, 325 F. Supp. 302 (E.D. Pa. 1971). The threatened shutdown of the former New Haven was made in connection with a motion to dismiss the proceeding, pursuant to section 77(e) and 77(g) of the Bankruptcy Act. *In Re New York, New Haven & Hartford Railroad Co.*, 289 F. Supp. 451, 459 (D. Conn. 1968). However, this Court warned of the risks an investor takes in railroad securities. *New Haven Inclusion Cases*, 399 U.S. 392, 491 (1970).

The CNJ reorganization court has attempted to decide the line abandonments in advance of the final I.C.C. determination. As such, the court interferes with the agency functions. This Court stated in *Smith v. Hoboken R. Co.*, 328 U.S. 123, 130 (1946):

> The point is that if the reorganization court decrees a forfeiture in advance of consideration of the problem by the Commission, it interferes with the functions entrusted to the Commission under section 77.

The question of a reorganization court's power to order a "temporary suspension" of operations is of great importance to the administration of railroads in reorganization. We believe one commentator has summed up a real danger:[11]

> The other possibility is that the roads will simply stop operating. Now that Judge Augelli has shown how to get around I.C.C. and state restrictions, rail analysts are wondering what would happen if Judge J. William Ditter, who has responsibility for the Reading, should tell it to stop operating unprofitable routes and Judge Fullam should say the same to the Lehigh and the Penn Central. The chaos that would result would be enormous.

The question presented is substantial and is likely to recur. *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911); *Carroll v. President and Commissioners of Princess Ann*, 393 U.S. 175, 179 (1968); *Moore v. Ogilvie*, 394 U.S. 814 (1969).

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[11] *Business Week*, No. 2230, May 27, 1972, at pp. 72-73.

CONCLUSION

For these reasons, the Court should issue a writ of certiorari to review the judgments and opinions of the Third Circuit.

Respectfully submitted,

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June, 1972

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

In the Matter of	)	
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY	)	In Proceedings for the Reorganization of a Railroad
Debtor.	)	No. B 401-67
	)	ORDER NO. 445

[Filed December 20, 1971]

R. D. TIMPANY, Trustee of the property of the Debtor, having filed a verified petition seeking instructions; and the matter having come on for a hearing which was duly noticed; and the Court having considered the verified petition, the affidavits of the Trustee and Robert Frederickson, other evidence offered by the parties at the hearing, and matters of record in the proceeding; and all parties in interest having been given the opportunity to cross-examine, to introduce evidence and to be heard; and good cause appearing,

IT IS, on this 20th day of December, 1971,

ORDERED, that the Trustee be and he hereby is directed to temporarily suspend on April 1, 1972 all operations of the Debtor in the Commonwealth of Pennsylvania pending final decision by the Interstate Commerce Commission on the abandonment application in Finance Docket No. 26659, et al.; and it is

FURTHER ORDERED, that in the event the aforementioned abandonment application is denied by the Interstate Commerce Commission or any court in whole (or in any respect which this Court shall find, after application on 10 days notice and hearing, shall not be in the best inerest of the Debtor's estate) the Trustee be and he hereby is directed to cease all operations of the Debtor; and it is

FURTHER ORDERED, that all parties and all other persons including therein all firms, corporations, state and local (but not federal) governmental entities (their departments, agencies, officers, agents and employees) and anyone in privy, concert or participation with any such parties or persons having notice or knowledge of the entry of this Order are severally enjoined and restrained from instituting or maintaining any action or proceeding affecting the operations (or the cessation or abandonment thereof) of the Debtor in the Commonwealth of Pennsylvania in any court other than this Court, or without first obtaining leave of this Court to do so; except that nothing contained herein shall be construed in any manner whatsoever (a) to affect the right of anyone to institute or proceed with any proceeding in any other railroad reorganization pending in any other jurisdiction and (b) to affect the right of anyone to seek any proper appeal or other review of the within Order in the United States Circuit Court of Appeals for the Third Circuit; and it is

FURTHER ORDERED, that the Trustee be and he hereby is authorized to draw down as needed the $1,000,000 referred to in the aforementioned Petition for Instructions and to utilize such funds for operations in accordance with the above directions; and it is

FURTHER ORDERED, that this Court hereby reserves jurisdiction of the subject matter of the within Order; and it is

FURTHER ORDERED, that a copy of this Order be served upon all intervenors in this Reorganization Proceeding, all persons participating in the hearing on the Petition for Instructions, and all persons party to the aforementioned abandonment proceedings before the Interstate Commerce Commission.

/s/ Anthony T. Augelli
C.J. U.S.D.C.

ORDER NO. 451

ORDER AUTHORIZING ABANDONMENT OF CERTAIN LINES AND OPERATIONS

[Filed January 11, 1972]

R. D. TIMPANY, Trustee of the property of the Debtor, having filed on May 7, 1971 a verified petition for Authority to Abandon Certain Lines and Operations and To Sell; and the Court by Order No. 408 having directed notice with respect to same; and the Court by Order No. 410, after hearing on the aforementioned petition, having authorized the Trustee to verify and file with the Interstate Commerce Commission an abandonment application, the Court reserving jurisdiction; and the Interstate Commerce Commission having entered orders bearing service date of August 24, 1971 with respect to ten of the lines and operations involved; and the Trustee having on September 7, 1971 filed a further verified petition seeking an order authorizing the abandonment of those ten lines and operations as detailed in

the petition and the orders of the Interstate Commerce Commission attached thereto; and the Interstate Commerce Commission subsequently having by order bearing service date of November 26, 1971 modified one of the ten orders attached to the aforementioned verified petition of the Trustee of September 7, 1971; and the matter having come on for hearing which was duly noticed; and all parties in interest having been given the opportunity to cross examine the Trustee, to introduce evidence and to be heard; and the Court having considered the record before it and the arguments of counsel; and good cause appearing, it is on this 11th day of January, 1972,

ORDERED that the Trustee be and he hereby is authorized to abandon the lines and operations set forth in his verified petition of September 7, 1971 and specifically referred to in the orders of the Interstate Commerce Commission attached thereto and as modified by the Interstate Commerce Commission order bearing service date of November 26, 1971; and it is further

ORDERED that the Trustee be and he hereby is authorized to take any and all steps necessary to carry out the foregoing.

ANTHONY T. AUGELLI,
C.J.U.S.D.C.

/s/ Anthony T. Augelli

C.J.U.S.D.C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-2163, 72-1050 and 72-1051

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Debtor*

COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants in No. 71-2163

READING COMPANY,
Appellant in No. 72-1050

UNITED TRANSPORTATION UNION,
Appellant in No. 72-1051

(Appeals from D. C. Order No. 445)

(D. C. No. B-401-67 In Bankruptcy)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued March 9, 1972

Before MCLAUGHLIN, VAN DUSEN and ALDISERT, *Circuit Judges*

OPINION OF THE COURT

(Filed March 10, 1972)

PER CURIAM:

We have carefully considered all the contentions presented by the various Appellants by briefs and oral argument in these expedited appeals. We do not find them persuasive to require that Order No. 445 of the Bankruptcy Court be vacated.

The Order No. 445 of the Bankruptcy Court will be affirmed.

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1023

In the Matter of
THE CENTRAL RAILROAD COMPANY OF
NEW JERSEY, *Debtor*

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants

(Appeal from D. C. Order No. 451)

(D. C. No. B-401-67 In Bankruptcy)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued March 9, 1972

Before McLAUGHLIN, VAN DUSEN and ALDISERT, *Circuit Judges*

OPINION OF THE COURT

(Filed March 10, 1972)

PER CURIAM:

We have carefully considered all the contentions presented by the various Appellants by briefs and oral argument in this expedited appeal. We do not find them

persuasive to require that Order No. 451 of the Bankruptcy Court be vacated.

The Order No. 451 of the Bankruptcy Court will be affirmed.

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

For Release: Immediate
Friday, March 24, 1972 No. 120-72

LEHIGH VALLEY GIVEN EMERGENCY AUTHORITY TO TAKE OVER CNJ OPERATIONS IN PENNSYLVANIA

The Commission today issued an emergency service order (No. 1094) authorizing the Lehigh Valley Railroad Company to take over all operations of the Central Railroad of New Jersey throughout Pennsylvania as of April 1, 1972. Today's order was made necessary by an embargo imposed by the CNJ preliminary to cessation of operations in Pennsylvania as of April 1. The purpose of this order is to insure continuous service to, from and through Pennsylvania over the lines now being operated by the Central of New Jersey.

The Commission has under active consideration an application of the Central Railroad of New Jersey for emergency authority to interchange traffic with various railroads over routes which by-pass the lines it has been operating in Pennsylvania. Action on the application is anticipated shortly.

Following today's action by the Commission, the Central of New Jersey presumably will retire from its operation in Pennsylvania pursuant to its embargo notices and directives from the governing reorganization court. However, it still will be required to leave intact certain facilities essential to the safe operations and control of movement over the track, including train control and signal devices.

* * * * *

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 71-2163, 72-1050 and 72-1051

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, debtor

Commonwealth of Pennsylvania and
Pennsylvania Public Utility Commission,
Appellants in No. 71-2163

Reading Company, Appellant in No. 72-1050

United Transportation Union, Appellant in No. 72-1051

(Appeals from D.C. Order No. 445)
(D.C. No. B-401-67 In Bankruptcy)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: McLaughlin, Van Dusen and Aldisert, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that Order 445 of the said District

Court, filed December 20, 1971, be, and the same is hereby affirmed. Costs taxed against Appellants.

ATTEST:

/s/ Thomas Quinn
Clerk

Dated: March 10, 1972
Certified as a true copy and
issued in lieu of a formal
mandate on March 22, 1972.

Test: Thomas F. Quinn
Clerk, United States Court
of Appeals for the
Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1023

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

Commonwealth of Pennsylvania and
Pennsylvania Public Utility Commission,
Appellants

(Appeal from D.C. Order No. 451)
(D.C. No. B-401-67 In Bankruptcy)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: McLaughlin, Van Dusen and Aldisert, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that Order No. 451 of the said

District Court, filed January 11, 1972, be, and the same is hereby affirmed. Costs taxed against Appellants.

ATTEST:

/s/ Thomas F. Quinn
Clerk

Dated: March 10, 1972
Certified as a true copy and
issued in lieu of a formal
mandate on March 22, 1972.

Test: Thomas F. Quinn
Clerk, United States Court
of Appeals for the
Third Circuit.

APPENDIX B

Section 1(18)-1(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-1(20):

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or

the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 77(o) of the Bankruptcy Act, 11 U.S.C. 205(o):

(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and

what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

Judicial Code, Title 28:

SEC. 1398. [*As codified June 25, 1948, August 30, 1964.*] [*28 U. S. C. § 1398.*] INTERSTATE COMMERCE COMMISSION'S

COPY

Supreme Court, U. S.
FILED
JUL 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANLEY WEISS, ESQ.
744 Broad Street
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Attorney for R. D. Timpany, Trustee of the Property of The Central Railroad Company of New Jersey

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1100 Raymond Boulevard
Newark, New Jersey 07102
Of Counsel

Attorneys for Respondent

July, 1972

IN THE

Supreme Court of the United States

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, R. D. Timpany, Trustee of the property of The Central Railroad Company of New Jersey (CNJ) submits this Brief in opposition to Petitioners' petition for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 10, 1972.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether this Court has jurisdiction of and should grant certiorari with respect to a dispute which events have rendered moot and to matters adjudicated, not in the order sought to be reviewed, but in an order presently on appeal to the Third Circuit.

COUNTERSTATEMENT OF THE CASE

On December 20, 1971 the CNJ Reorganization Court entered Order No. 445 which, *inter alia,* directed CNJ to temporarily suspend on April 1, 1972 all operations in the Commonwealth of Pennsylvania pending final decision by the Interstate Commerce Commission on its abandonment application and stayed persons from instituting or maintaining actions affecting the operations (or the cessation or abandonment thereof) of the Debtor in the Commonwealth of Pennsylvania without first obtaining leave of the Reorganization Court to do so. Order No. 445 was entered after hearing (at which Petitioners offered negligible proofs) on a petition for instruction (App. 1a-6a) concerning further borrowing of funds on guaranteed trustee's certificates. The petition had raised serious questions as to the propriety of continued borrowings to finance projected loss operations in view of delays and uncertainties that had arisen concerning the implementation of the estate's program to transform the CNJ into a viable railroad—a program which had as its heart the abandonment of Pennsylvania operations which had only been adopted after approval by the Secretary of the Department of Transportation in consultation with the Interstate Commerce Commission pursuant to the Emergency Rail Services Act of 1970, 45 U.S.C.A. 661 et seq, and after extensive litigated adversary proceedings resulting in a final order binding upon Petitioners.

Thereafter Petitioners moved in the Reorganization Court, *inter alia,* for leave under Order No. 445 to maintain the action they had previously commenced in the United States District Court for the Middle District of Pennsylvania to review certain abandonment orders of the Interstate Commerce Commission. After full hearing the CNJ Reorganization Court entered Order No. 454 denying such motion (App. 7a). Petitioners filed a notice of appeal of Order No. 454. The appeal was docketed in the Third

Circuit on February 24, 1972 (Docket No. 72-1136); and no further action has been taken with respect to it.

On January 11, 1972 after full hearing pursuant to §77(o) of the Bankruptcy Act, the CNJ Reorganization Court entered Order No. 451 authorizing the abandonment of the operations and lines which had previously been authorized by orders of the Interstate Commerce Commission, which orders form the subject matter of the action referred to above brought by Petitioners in the Middle District of Pennsylvania.

On April 1, 1972 CNJ temporarily suspended its Pennsylvania operations. Prior to such suspension, the Interstate Commerce Commission had granted temporary authority to the Lehigh Valley Railroad to take over CNJ's Pennsylvania operations; and subsequently by order bearing service date of June 2, 1972 the Interstate Commerce Commission conditionally authorized the Pennsylvania abandonments and extensions sought by CNJ and Lehigh Valley. On April 6, 1972 CNJ abandoned the lines and operations forming the subject matter of Order No. 451.

ARGUMENT

The temporary suspension of CNJ's operations occurred on April 1, 1972; and the propriety of such suspension has been subsequently confirmed by the Interstate Commerce Commission order bearing service date of June 2, 1972. The ten abandonments pursuant to Order No. 451 occurred on April 6, 1972. Disputes concerning such suspension or abandonments have now been mooted by the passage of time and intervening events. As such, a case or controversy is not presented; and this Court lacks jurisdiction to proceed.

The injunctive provisions of Order No. 445 reserve to the Reorganization Court decision as to the forum or forums in which litigation (including review of Interstate

Commerce Commission orders) affecting the subject matter of the order should be maintained or brought. It was an exercise of the inherent power of a court of equity to protect its own decrees and of the Reorganization Court's exclusive jurisdiction over the Debtor and its property wherever located. It provided for leave for litigations to be brought elsewhere upon a proper showing. Petitioners sought leave to maintain the action pending in the Middle District of Pennsylvania and were denied same by Order No. 454. Their proper quarrel, if any, is with that Order and not Order No. 445. They filed a notice of appeal from Order 454; and that appeal is pending in the Third Circuit and was not ruled upon by the Third Circuit in the judgments entered by it on March 10, 1972.

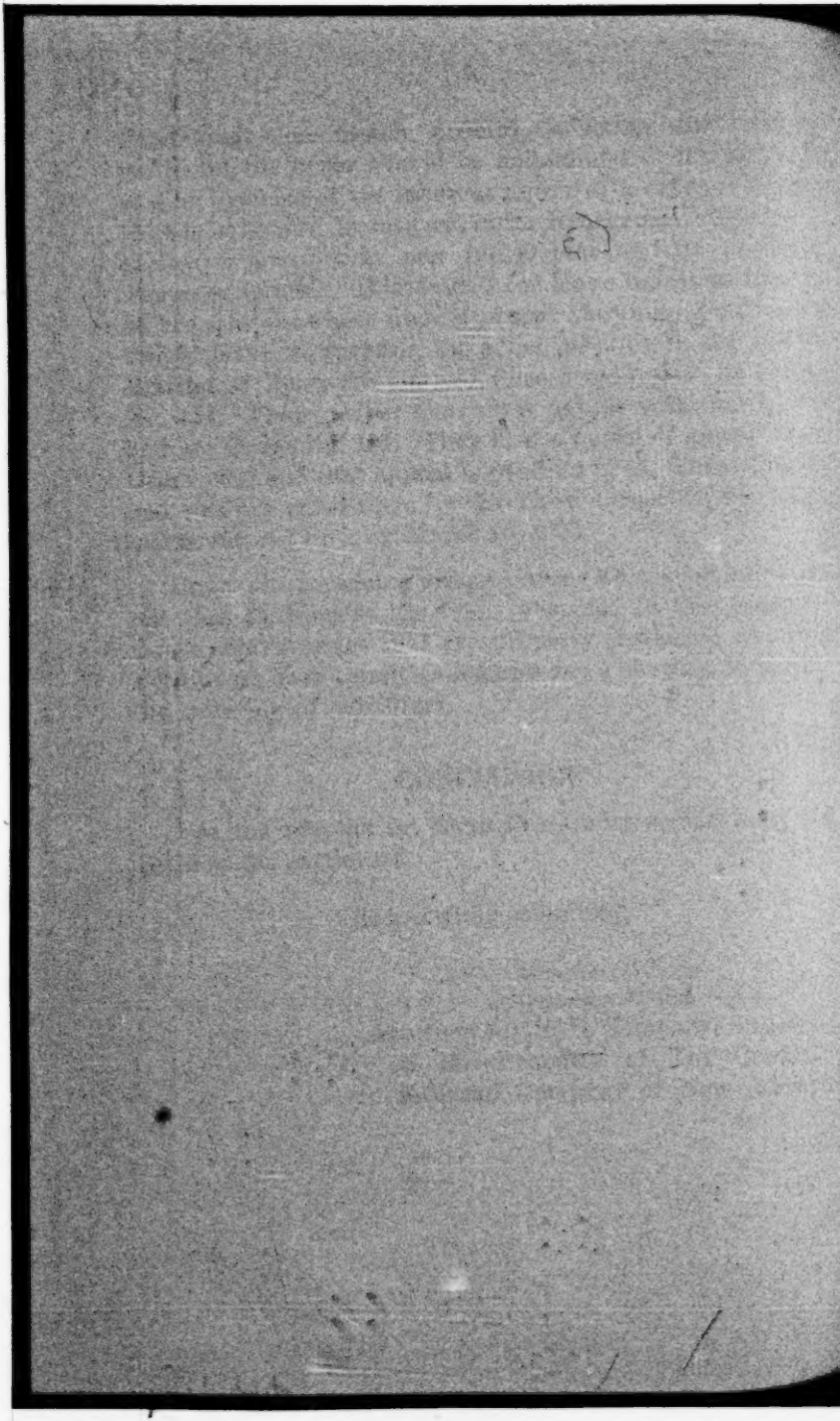
Under the foregoing circumstances we respectfully submit that Petitioners have not presented to this Supreme Court controversies that are properly justicable and that Petitioners have totally failed to make a showing to justify the granting of certiorari.

CONCLUSION

For the reasons set forth this Court should deny the petition for certiorari.

Respectfully submitted,

STANLEY WEISS
STANLEY WEISS
Attorney for R. D. Timpany, Trustee
of the Property of The Central
Railroad Company of New Jersey



APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	In Proceedings for the Reorganization of a Railroad No. B 401-67

PETITION OF THE TRUSTEE FOR INSTRUCTIONS CONCERNING FURTHER BORROWING OF FUNDS ON GUARANTEED TRUSTEE'S CERTIFICATES

To: THE HONORABLE ANTHONY T. AUGELLI
Chief Judge
United States District Court
District of New Jersey

Your petitioner, R. D. Timpany, Trustee of the property of The Central Railroad Company of New Jersey, respectfully represents that:

1. On March 26, 1971 this Honorable Court entered Order No. 400 authorizing your petitioner to issue and sell guaranteed trustee's certificates up to $6,000,000 in principal amount, conditioning the expenditure of such funds upon further order of this Court.

2. On April 14, 1971 this Honorable Court entered Order No. 402 authorizing your petitioner to expend for certain purposes $2,500,000 of funds to be received from the sale of trustee's certificates.

3. To date your petitioner has drawn down $1,500,000 of the $2,500,000 authorized by Order No. 402; and based upon present estimates your petitioner believes that he will need further monies by November, 1971 if the Debtor is to continue operations thereafter.

4. Your petitioner believes that this Honorable Court entered Order No. 400 expecting, and in order to permit the Blueprint for Survival (Blueprint) to be implemented; and your petitioner requires instructions as to whether to borrow further monies against the sums authorized by Order No. 402 in view of the status of the implementation of the Blueprint.

5. Some progress has been made in the implementation of the Blueprint. Specifically:

(a) the Debtor has discontinued the major portion of its lighterage service and for all practical purposes has minimized the burdens of the coal dock;

(b) a 20% passenger fare increase has been authorized, though President Nixon's wage-price freeze has prevented its implementation;

(c) initial steps have been taken by the Debtor and labor—more specifically described in petitioner's letter to the Court and all parties dated September 1, 1971—to alleviate the burdens of the work rules;

(d) significant efforts are under way for the development of the Debtor's port properties;

(e) the Debtor's internal operations have been substantially revised in a manner that your petitioner believes makes it more responsive to the Debtor's problems.

The Debtor's losses have declined from the levels incurred last year and from those forecast for the first eight months

of the present year in the application to the federal Department of Transportation for guaranteed trustee's certificates.

6. Notwithstanding the foregoing, the Debtor's losses continue and are presently forecast by the Debtor to continue in substantial magnitude. Your petitioner is of the opinion that these losses will not and cannot be stopped without a restructuring of the configuration of the Debtor's lines such as is proposed in the Blueprint.

7. It is with respect to the restructuring of the configuration of the Debtor's lines that progress in the implementation of the Blueprint has been negligible. Your petitioner has been unable to date to cause arrangements to be consummated with other carriers and the Lehigh Coal and Navigation Company (LC&N) which would assure alternative rail services to the Debtor's Pennsylvania customers. While both the Lehigh Valley Railroad Company and Reading Company have indicated interest in providing alternative rail service (both having filed applications to the Interstate Commerce Commission (ICC) with respect to same) and while LC&N has expressed interest in obtaining a new lessee to provide such service, agreements have still not been reached. As a consequence, numerous shippers and the Commonwealth of Pennsylvania have vigorously protested the abandonments. The legal status of the abandonment proceedings is substantially as follows:

(a) on May 25, 1971 your petitioner, pursuant to Order No. 410, filed as abandonment application with the ICC seeking the necessary certificates by July 6, 1971;

(b) on August 19, 1971 your petitioner filed with the ICC a motion for interim relief seeking an order permitting the Debtor's immediate abandonment of its Pennsylvania operations and permitting the Lehigh

Valley Railroad Company and/or the Reading Company to provide alternative service pending ultimate resolution of the extent to and the terms upon which either or both of said carriers would be permanently authorized to provide such service;

(c) On August 20, 1971 the ICC issued a series of orders (bearing service date of August 24, 1971) permitting abandonments on ten of the segments involved covering 38 miles of line, most of which were out of service. As for the other twenty segments, the ICC issued an order establishing procedures for a prehearing conference scheduled to commence on October 4, 1971. True copies of the orders covering the ten segments on which abandonments were granted have recently been filed with the Court as exhibits to the petition of the Trustee for authority to abandon certain lines and operations. A true copy of the remaining order covering the other twenty segments is attached hereto as Exhibit A;

(d) subsequent to August 20, 1971 various petitions have been filed with the ICC by various parties seeking reconsideration of the orders issued August 20, 1971; and other papers have been filed alleging inadequacies in your petitioner's abandonment application and raising issues—such as, whether the Debtor's operation of the Pennsylvania lines is unprofitable—which it is claimed requires full hearing. Some parties have argued that there is no urgency in deciding the application in view of the as yet undisbursed funds potentially available from the sale of guaranteed trustee's certificates pursuant to Order No. 400.

8. The foregoing developments raise material risks to the prompt and effective implementation of the Blueprint. Under these circumstances, and particularly in view of the constitutional issues involved in the hearing giving rise to the entry of Order No. 400, there is a serious question as to

the propriety of continued borrowing of funds which the Debtor forecasts will be lost in further operations under its existing configuration. It is for this reason that your petitioner seeks instructions as to whether to exercise his authority to borrow funds for operations past November 1, 1971.

9. On the assumption that significant progress in the implementation of the Blueprint is not made in the course of the ICC proceedings scheduled to commence on October 4, 1971, the alternatives facing the estate of the Debtor appear to be as follows:

(a) to instruct the Trustee to continue to borrow in the hope that somehow, some way, and at some time a way will be found to either implement the Blueprint or to otherwise keep operating on a different program than that which formed the basis of the borrowing;

(b) to instruct the Trustee to continue borrowing but to limit his expenditures to those necessary for the maintenance of the New Jersey rail services which the Secretary of Transportation found were essential transportation services and which form the basis of the Blueprint for Survival. Such a course involves balancing the prohibitions contained in 49 U.S.C. 1(18)—(20) against the possible infringement of the constitutional rights of the creditors of the estate of the Debtor that may be involved in a continued operation on a basis other than projected in the Blueprint for Survival;

(c) to instruct the Trustee not to make further borrowings and to arrange for an orderly cessation of service. In this regard it should be recalled that the Emergency Rail Transportation Act of 1970, Order No. 400 authorizing the issuance of guaranteed trustee's certificates, and the underlying documentation on the guaranteed trustee's certificates financing, all give

to the Secretary of Transportation, in the event of actual or threatened cessation of the essential transportation services, the option to lease trackage rights over the lines of the Debtor and such equipment as may be necessary to provide the services which he has found to be essential—the terms to be subject to the approval of the reorganization court and the ICC but the provision of services not to await such approvals.

Your petitioner will have a recommendation as to a course to be followed at the time of the hearing on this petition based upon the then present circumstances.

WEREFORE, your petitioner prays that an order be entered instructing him upon the course or courses of action to be followed in the premises.

R. D. TIMPANY
R. D. TIMPANY
Trustee of the Property of
The Central Railroad Company of New Jersey

STATE OF NEW JERSEY
COUNTY OF ESSEX } ss.:

R. D. TIMPANY, being duly sworn, deposes and says that he is the petitioner in the foregoing petition and that the statements contained therein are true according to the best of his knowledge, information and belief.

R. D. TIMPANY

Sworn to and subscribed
before me this 30th day
of September, 1971

ROSE A. FERRANTE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Apr. 7, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	In Proceedings for the Reorganization of a Railroad No. B 401-67 Order No. 454

ORDER DENYING APPLICATIONS BY THE COMMONWEALTH OF PENNSYLVANIA, THE PENNSYLVANIA, PUBLIC UTILITY COMMISSION AND OTHER PARTIES.

The Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, and the other parties plaintiff to proceedings pending in the United States District Court for the Middle District of Pennsylvania in Civil No. 71-416, filed September 24, 1971, having moved for:

(i) modification of Order No. 445 so as to exclude its application to the aforementioned proceeding in the United States District Court for the Middle District of Pennsylvania;

(ii) leave to maintain the aforementioned action in the United States District Court for the Middle District of Pennsylvania; or

(iii) a stay on appeal of the injunctive provisions of Order No. 445, and the matter having come on for a hearing, and all parties in interest having been heard or given the opportunity to be heard, and good cause showing, it is on this 19th day of January, 1972,

ORDERED that the aforementioned motions be and the same are hereby denied.

ANTHONY T. AUGELLI
ANTHONY T. AUGELLI, C.J.U.S.D.C.

COPY

FILED
JUL 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners,

against

UNITED STATES OF AMERICA, *et al.*,
Respondents.

REPLY BRIEF OF RESPONDENT 3¼% MORTGAGE BONDHOLDERS' PROTECTIVE COMMITTEE

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement	2
Argument	
I. The reorganization court has the power to order, as it did in Order No. 445, suspension of the Debtor's Pennsylvania lines on April 1, 1972 and cessation of all its operations if the Trustee's application to the Interstate Commerce Commission to abandon should be denied in whole or in any respect which the court finds is not in the best interest of the Debtor's estate	3
II. An appeal from an order of the Interstate Commerce Commission authorizing the Debtor to abandon portions of its lines must be made to the reorganization court	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

New Haven Inclusion Cases, 399 US 392, 26 LEd 691, 90 SCt 2054 ..... 4, 5, 7, 10

New York, N.H. & H.R. Co., In re, 289 F. Supp. 451; D. Conn. 1968 10

Statutes:

Bankruptcy Act:

Sec. 77(a), 11 USC Sec. 205(a) 6

Sec. 77(o), 11 USC Sec. 205(o) 6

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA, *et al.*,

Respondents.

REPLY BRIEF OF RESPONDENT 3¼% MORTGAGE BONDHOLDERS' PROTECTIVE COMMITTEE

Questions Presented

1. Whether the reorganization court has the power to authorize a shutdown of the Debtor's lines, or all of its lines, without authorization of the Interstate Commerce Commission.

2. Whether an order of the Interstate Commerce Commission authorizing the Debtor to abandon portions of its lines must be appealed to a three-judge court or must it be made to the reorganization court.

Statement

The Respondent 3¼% Mortgage Bondholders' Protective Committee was authorized by the Interstate Commerce Commission, by order dated September 13, 1968 in Finance Docket No. 24535, to solicit and represent holders of the Debtor's 3¼% Mortgage Bonds.

The reorganization court permitted this Respondent to intervene in this proceeding by order dated and entered October 1, 1969. That order was affirmed by the Court of Appeals for the Third Circuit by order dated July 17, 1970. An application to reverse the order of that court was made to this Honorable Court which denied certiorari on March 1, 1971.

This Respondent, through counsel, has taken part in all proceedings in this matter in the reorganization court, the Court of Appeals, this Honorable Court and before the Interstate Commerce Commission. It represents a substantial amount of the outstanding bonds.

We believe that the briefs of the Trustee and other Respondents will set forth the relevant facts, so that it will not be necessary for us to burden this Court with repetitious statements.

We also have been advised that the briefs of the Trustee and other Respondents will cite the relevant legal decisions and authorities so that it will not be necessary to set forth an extended discussion of the applicable law herein.

This Respondent respectfully submits that the reorganization court below acted properly and with full authority in making the orders involved in this petition, namely Order No. 445 and Order No. 451 and that they were properly affirmed by the Court of Appeals for the Third Circuit. The affirmance should stand and the petition for the writ of certiorari should be denied.

ARGUMENT

I

The reorganization court has the power to order, as it did in Order No. 445, suspension of the Debtor's Pennsylvania lines on April 1, 1972 and cessation of all its operations if the Trustee's application to the Interstate Commerce Commission to abandon should be denied in whole or in any respect which the court finds is not in the best interest of the Debtor's estate.

The Debtor has lost and is continuing to lose substantial sums of money annually. These losses amount to millions of dollars each year. As a result of its familiarity with the Debtor's operations and after taking testimony as to its losses, the reorganization court was convinced that the Debtor could not continue in business unless its operations in the Commonwealth of Pennsylvania were eliminated.

Early in 1971 the reorganization court authorized the Trustee to apply to the Interstate Commerce Commission for leave to abandon the Debtor's Pennsylvania lines.

Because of the Debtor's continued losses, and in the reorganization court's opinion of the disastrous effect of

the losses of the Pennsylvania lines on the Debtor's entire system, the court decided that it was necessary to suspend all operations in Pennsylvania on April 1, 1972 and it issued Order No. 445. We respectfully submit that the reorganization court has that power and that it properly made that order.

This Honorable Court has set forth the underlying principles governing railroad reorganizations in *New Haven Inclusion Cases,* 399 US 392, 26 LEd 2d 691, 90 SCt. 2054 (1970), in which Mr. Justice Stewart's opinion stated (p. 431):

> "After 35 years of §77, as amended, it is unnecessary to recanvass the two basic objectives of the statute —the conservation of the debtor's assets for the benefit of creditors and the preservation of an on going railroad in the public interest. See generally 5 Collier, supra ¶77.02, at 469-470. Central to the statutory objective that the reorganized company should, if at all possible, emerge as a 'living, not a dying * * * enterprise', Van Schaick v. McCarthy, 116 F 2d 987, 993, is the understanding that 'a railroad [is] not like an ordinary insolvent estate.' Palmer v. Massachusetts, 308 US at 86, 84 L Ed at 99. (Footnote omitted). * * *"

The reorganization court found, in issuing Order No. 445 that the suspension of Debtor's operations in the Commonwealth of Pennsylvania would permit the continuation of part of Debtor's railroad which will serve a tremendous number of industries and will preserve the Debtor's assets. The reorganization court therefore exercised the power and jurisdiction given to it by the Bankruptcy Act.

There are many authorities which may be cited in other briefs herein to sustain the power and jurisdiction of a reorganization court to order a suspension or shutdown of a railroad's operations. Such shutdowns are justified not only by the physical condition of the railroad, but also by the lack of finances necessary to operate the road.

As this Honorable Court pointed out in the *New Haven Inclusion Cases* (*supra*), at 415, Judge Anderson (the reorganization judge in those cases) ruled that because of the New Haven's dwindling cash reserves, unless the Interstate Commerce Commission ordered inclusion of the New Haven into the Penn Central by January 1, 1969, he would entertain a motion to dismiss the reorganization proceeding, resulting in termination of all the New Haven's train service.

We respectfuly submit that there is no reason why the reorganization court in this proceeding was not also justified in shutting down all of the Debtor's operations in the face of continued drastic losses.

It should also be noted, in balancing the equities of the situation, that the petitioner, Commonwealth of Pennsylvania, has not offered, at any time, any plan or suggestion whereby the Debtor's lines in Pennsylvania could continue to be operated without continued, substantial losses, nor has it offered any financial subsidy which would enable the Debtor to continue the operation of those lines. The reorganization court and the Court of Appeals undoubtedly considered the equities as well as the legal factors involved.

We submit, therefore, that the affirmance by the Court of Appeals of the reorganization court's Order No. 445 should stand, and that a writ of certiorari should not issue.

II

An appeal from an order of the Interstate Commerce Commission authorizing the Debtor to abandon portions of its lines must be made to the reorganization court.

We respectfully submit that any appeal from an order of the Interstate Commerce Commission authorizing the Debtor to abandon portions of its lines must be made to the reorganization court.

Section 77(a) of the Bankruptcy Act (11 USC, Sec. 205(a)) states, in part:

> "(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. * * * If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. * * *."

Section 77(o) of the Bankruptcy Act (11 USC Sec. 205(o)) states in part:

> "(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any,

should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. * * *".

We respectfully submit that these provisions confer authority upon the reorganization court to review orders of abandonment issued by the Interstate Commerce Commission.

The opinion of Mr. Justice Stewart of this Honorable Court in *New Haven Inclusion Cases* (*supra*), states ample authority for asserting the authority of the reorganization court in this regard. The ultimate question there was the price to be paid by Penn Central for the assets of the New Haven. The Interstate Commerce Commission's order fixing that price was remanded by the reorganization court for further proceedings, ruling that, because of the con-

tinuing drain on the New Haven's dwindling cash reserves, unless the Commission ordered inclusion by January 1, 1969, the Court would entertain a motion to dismiss the reorganization proceeding resulting in termination of all the New Haven's train service.

The Commission certified a revised plan which again was rejected by the reorganization court. An appeal was taken to a three-judge court, which denied the bondholders' application for injunctive relief. Mr. Justice Stewart said (p. 419):

> "* * *. From the outset all the parties in the three-judge court recognized that the pricing questions presented in the litigation there were also destined to come before the reorganization court under §77 of the Bankruptcy Act. * * *",

and in commenting on the three-judge court's ruling, he said (p. 420):

> "In this ruling, the three-judge court was correct. The jurisdiction of the reorganization court was not open to question. Upon its approval of the New Haven's petition for reorganization in 1961, that court had acquired 'exclusive jurisdiction of the debtor and its property wherever located * * *.' Id. §77(a) 11 USC §205(a) * * *". (Citing cases in footnote 52).

There are a number of other statements in Mr. Justice Stewart's opinion which underscore the reorganization court's jurisdiction. On page 421, he stated:

> "* * * Together the [reorganization] court and the Commission 'unquestionably' had 'full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that [might] be

asserted against it.' Callaway v Benton, 336 US 132, 147, 93 L Ed 553, 564, 69 S Ct 435. One such power was precisely that which the Commission was about to propose that the reorganization court exercise—the power to confirm a plan of reorganization providing for 'the sale of all * * * of the property of the debtor * * *' Bankruptcy Act, §77(b)(5), 11 USC §205(b)(5). To that end the Commission was required to certify its proposal to the court as a prerequisite to judicial approval. §77(d), 11 USC §205(d). Injunctive intervention by the three-judge court would thus have disrupted an essential statutory phase of the New Haven reorganization."

Interference by a three-judge court, as requested by the appellants would similarly disrupt this proceeding, particularly since the Commission has issued an order to abandon the Debtor's Pennsylvania lines.

It is argued that the three-judge court should review the Commission's order of abandonment. However, Mr. Justice Stewart's opinion disposed of that argument. Referring to situations where a three-judge court has been asked to consider the same pricing questions as the reorganization court, he said (p. 426):

"* * *. We recognize that that principle has commonly applied in cases where both courts assert in rem jurisdiction over the property in dispute, and that here the three-judge court's jurisdiction was in personam in character. But the conflict was nonetheless one 'between two coordinate courts of concurrent, overlapping jurisdiction, neither belonging to a class which by paramount law is categorically given a jurisdiction over the particular subject matter paramount to the jurisdiction of the other.' In re New York, N.H. & H.R. Co., 26 F Supp 18, 24, aff'd sub nom Palmer v.

Warren, supra. And given that conflict the three-judge court could have followed the settled proposition that '[t]he court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto.' Lion Bonding & Surety Co. v Karatz, 262 US 77, 89, 67 L Ed 871, 880, 43 S Ct 480.

Surely a vesting of primary jurisdiction in the reorganization court comports with the basic purpose of §77. * * *".

This Honorable Court has recognized and affirmed the power of the reorganization court to order a debtor railroad to cease all operations and liquidate if the court finds that further operations of the debtor solely for the public interest would violate the Fifth Amendment as an unconstitutional taking of the debtor's property. *New Haven Inclusion Cases* (*supra*).

As we have pointed out above, Judge Anderson, sitting as reorganization court for the New Haven Railroad under §77 (*In re New York, N.H. & H. R. Co.*, 289 F Supp 451; D. Conn. 1968) ordered that the inclusion of the New Haven in the Penn Central system take place no later than January 1, 1969, or he would permit no further financing of the railroad's deficit operations at the expense of the New Haven estate, and, as a result the line would shut down.

In recognizing Judge Anderson's power to do so, Mr. Justice Stewart's opinion stated (pp. 490-491):

> "A §77 reorganization court may not, of course, disregard a claim that injurious consequences will result to a secured creditor from the suspension of the right to enforce his lien against the property of a

> debtor. That claim, however, 'presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised.' Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & P.R. Co. 294 US 648, 677, 79 L Ed 1110, 1129, 55 S Ct 595. Here the reorganization court recognized its duties under the Bankruptcy Act and the Constitution. * * *."

This Honorable Court thus affirmed the power of the reorganization court to order a shutdown of a debtor's entire operation. In affirming that power, the opinion quoted Judge Anderson's ruling with approval in which he stated (p. 491):

> "'In view of the history of this deficit operation from the time of the filing of the petition under §77 and even before, the size of the losses, the long period of time necessarily involved in seeking to work out a solution, short of liquidation, through inclusion in the Penn-Central, the present condition of the Railroad and the rate of loss and out-flow of cash in the recent past and in the foreseeable future, this court finds that the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders, without just compensation. It is therefore constitutionally impermissible, and obviously no reorganization plan which calls for such a taking can be approved.' 289 F Supp, at 459."

Judge Anderson had the power to shut down the New Haven because of its condition and doubt of its future continuance. Judge Augelli, the reorganization judge in this proceeding, who has knowledge of the facts concerning this Debtor's condition and of its bleak prospects, certainly has

the power to order a partial shutdown of its operations, and the paramount power to review an order of the Interstate Commerce Commission which authorized abandonment of some of the Debtor's lines.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari to review the judgments and opinions of the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

BRIEF OF INDENTURE TRUSTEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 12, 1972

TABLE OF CONTENTS

	PAGE
Counterstatement of Questions Presented	2
Counterstatement of the Case	2
Argument	
I. As To Order No. 451 Of The Reorganization Court, The Petition For A Writ Of Certiorari Does Not Contain Any Complaint Whatever Of Error, Conflict With Other Precedents Or Damage To The Petitioners; And In This Respect At Least The Petition Is a Nullity	2
II. The Restraint Provision Of Order No. 445 Is Consistent With Prior Precedents Of This Court And Other Federal Courts And Federal Statutes	3
III. The Suspension-Of-Operations Provision Of Order 445 Is Also Consistent With Prior Precedents	6
Conclusion	9

TABLE OF AUTHORITIES

	PAGE
Chicago & N. W. Ry. Co. v. *United States* 52 F. Supp. 65, 67 (N. D. Ill 1943) *aff'd per curiam* 320 U.S. 718 (1943)	9
Colorado v. *United States,* 271 U.S. 153 (1926)	2
H. Messick, Inc v. *Baggett Transportation Co.,* 268 F. Supp. 459 (W.D. Mo 1967)	5
In re Imperial "400" National, Inc. 429 F. 2d 671, 677 (3rd Cir. 1970)	4
In re New York, N. H. & HRR Co. 289 F. Supp. 451, 454 (D. Conn 1968) (Reorganization Case I)	7
In re Penn Central Transportation Company, 446 F. 2d 1109 (3rd Cir. 1971, per McLaughlin, Aldisert and Gibbons, JJ.) cert. den., U.S. (1971)	4
Leonard Bros. Trucking Co. v. *U.S.* 301 F. Supp. 893 (S. D. Fla, 1969)	5
Myers v. *Arkansas & Ozarks Ry. Corp.,* 185 F. Supp. 36, 41 (W.D. Ark. 1960)	8
New Haven Inclusion Cases 399 U.S. 392, 435 (1970)	3, 4, 8
N. Y. N. H. & H. R. Co. Bondholders' Committee v. *United States,* 289 F. Supp. 418, 440-41 (S. D. N. Y., 1968)	7
Railroad Credit Corp. v. *Ecker,* 152F. 2d418, 421 (9th Cir. 1945)	3, 8
Thompson v. *Texas Mexican R. Co.* 328 U.S. 134 (1946)	5
Zirn v. *Hanover Bank* 215 F. 2d 63 (2nd Cir. 1954)	8
Bankruptcy Act, 11 U.S.C. § 205	2, 7
Urgent Deficiences Act, 28 U.S.C. §§ 1398(a), 1398(b), 2284, 2325; P.L. 88-513	5
Interstate Commerce Act, 49 U.S.C. § 1(18)-1(20)	2, 7
Revised Rules of the Supreme Court of the United States, Rule 19	3
1964 U. S. Code Cong. and Adm. News, p. 3235	5

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Respondent Manufacturers Hanover Trust Company (the Trust Company) is Indenture Trustee of the General Mortgage Bonds of the Debtor The Central Railroad Company of New Jersey. Said bonds are in default with respect to principal and interest in an amount in excess of $50,000,000, and the Trust Company has actively participated as a party intervenor in these reorganization proceedings since their inception in March, 1967. The Trust Company submits this brief in opposition to Petitioners' Petition for a Writ of Certiorari to review the judgment and opinions of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 10, 1972.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Trust Company concurs in the Counterstatement of Questions Presented as stated in the opposing briefs filed in this proceeding by the Reorganization Trustee, Mr. R. D. Timpany, and by the 3¼% Mortgage Bondholders Protective Committee.

COUNTERSTATEMENT OF THE CASE

The Trust Company concurs in the Counterstatement of the Case as stated in the aforesaid two opposing briefs.

ARGUMENT

I. As To Order No. 451 Of The Reorganization Court, The Petition For A Writ Of Certiorari Does Not Contain Any Complaint Whatever Of Error, Conflict With Other Precedents Or Damage To The Petitioners; And In This Respect At Least The Petition Is A Nullity.

The Reorganization Court's Order No. 451, as affirmed by the Circuit Court (Petition for a Writ, etc., pp. 3a-4a, 7a-8a, 12a-13a) deals exclusively with the abandonment of ten small and inactive segments of the Debtor's railroad operations, five in New Jersey and five in Pennsylvania (*ibid*, p. 3). Specifically, the Reorganization Court authorized the Reorganization Trustee to carry out previous orders of the Interstate Commerce Commission which had been entered by the Commission pursuant to conventional bilateral action under the Interstate Commerce Act, 49 U.S.C. § 1(18)-1(20), and the Bankruptcy Act, § 77(o), 11 U.S.C. § 205(o) (*ibid*, pp. 1b-3b).

Whereas the major question necessarily involved in abandonment proceedings before the *Commission* is whether the proposed abandonment be consistent with the "public necessity and convenience," 49 U.S.C. § 1 (18), *Colorado* v. *United States*, 271 U.S. 153, 168 (1926), the only issue presented on an appeal from the *Reorganization Court's*

action in approving an abandonment is whether the Reorganization Court has properly exercised its discretion in reaching its determination based upon the financial consequences to the Debtor itself and its creditors. Cf. *New Haven Inclusion Cases,* 399 U.S. 392, 435 (1970); *Railroad Credit Corp.* v. *Ecker,* 152 F.2d 418, 421 (9th Cir. 1945).

The Petition for a Writ of Certiorari contains no argument whatever directed to this particular issue, or in fact to any aspect of Order No. 451. The "Questions Presented" (*ibid,* p. 2) are confined to the restraint and the suspension of operations which are mandated in the other order cited in the Petition (Order No. 445, *ibid* p. 1a-3a); and the Petition's legal argument (*ibid,* pp. 7-12) follows exactly the same pattern.

Moreover, the Petition's "Statement" (*ibid,* pp. 3-6) not only makes no attempt to show injury to the Petitioners arising from the Reorganization Court's Order No. 451 but also clearly shows that appellate proceedings implicating the ten abandonments and the correctness of the Commission's determination are now pending elsewhere.

In the light of the requirements of Rule 19 of the Revised Rules, this Court should totally disregard, and of course deny, the Petition insofar as it involves Order No. 451.

If it were somehow possible to read into the Petition any question concerning Order No. 451, the Trust Company would concur in the Brief in Opposition filed by the Reorganization Trustee in these proceedings, to the effect that such question would be abstract and moot.

II. The Restraint Provision Of Order No. 445 Is Consistent With Prior Precedents Of This Court And Other Federal Courts And Federal Statutes.

In view of the need for speed, economy of effort and most particularly a seasoned understanding of the Debtor's

fundamental problems, we submit that much harm could be done by submitting to any court (or especially a multiplicity of courts) except the Reorganization Court, and to the local rules of procedure of any court or courts except those of the Reorganization Court, any judicial questions arising out of the present circumstances. Sensible application of procedural requirements, expedition of discovery, ready availability of records and witnesses, economy in the use of time and travel, assistance of experienced counsel, judicial background knowledge, and above all a sense of immediacy are, we submit, essential to the Debtor's salvation.

An order granting an injunction to protect the jurisdiction of a railroad reorganization court in diverse circumstances is well within the power of the court, as most recently exemplified by the current Penn Central litigation in the Circuit Court which heard the pending matters. See *In re Penn Central Transportation Company*, 446 F.2d 1109 (3rd Cir. 1971, per McLaughlin, Aldisert and Gibbons, JJ.), *cert. den.* U.S. (1971):

> "But the teachings of these cases [prior cases of the United States Supreme Court based upon diverse situations] do not preclude the reorganization court from 'enjoin[ing] the prosecution of any suit which would take from it the decision of any question which it has the duty to decide in connection with the reorganization or which would hamper it in any way in exercising the power imposed upon it.' *In re Imperial "400" National, Inc.*, 429 F.2d 671, 677 (3rd Cir. 1970)." *In re Penn Central Transportation Company, ibid.* at 1112.

A strong predilection for the primacy of the Reorganization Court was shown in the *New Haven Inclusion Cases, supra.*, 399 U.S. at 426, wherein Justice Stewart ruled that a three-judge court which technically possessed jurisdiction of a reorganization issue should better have declined to exercise that jurisdiction.

The Petition cites and quotes 28 U.S.C. §§ 1398(a) and 2325 as the venue basis for a three-judge court's review of those Commission orders which have already been issued (and perhaps anticipated future orders as well) in the Debtor's abandonment proceedings. (Petition for a Writ, etc., pp. 36-46).

Significantly, both § 1398(a) and 28 U.S.C. § 2284, to which § 2325 refers, expressly make exceptions for situations covered by other congressional enactments.

There is, in the present circumstances, another pertinent federal law which states such an exception but which the Petition does not even cite, i.e. 28 U.S.C. § 1398(b), as follows:

> "(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub. L. 88-513, § 2, 78 Stat. 695."

The foregoing section was enacted in 1964 (P.L. 88-513) and renders obsolete the older cases cited by petitioners such as *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134 (1946). Congress' purpose in enacting this venue provision was explicitly to keep Commission matters within the control of the referring court. Congress felt that the history of the prior act demonstrated both that the expertise of the referring court was being frustrated and that unnecessary delay was being tolerated in courts which lacked the referring court's sense of urgency. See 1964 U.S. Code Cong. and Adm. News, p. 3235 for the legislative history; see also *Leonard Bros. Trucking Co.* v. *U.S.*, 301 F. Supp. 893 (S.D. Fla., 1969); *H. Messick, Inc.* v. *Baggett Transportation Co.*, 268 F. Supp. 459 (W.D. Mo. 1967).

Very clearly the abandonment proceedings are "a question or issue" referred by the Reorganization Court to the Commission. Section 77(o), 11 U.S.C. § 205(o),

in fact, requires such a reference and the Reorganization Court has been guided by that section. It follows that the Reorganization Court has exclusive statutory venue of Commission orders in the abandonment proceedings, and no other court should act, even without regard to Order No. 445.

Finally, as noted in the Reorganization Trustee's brief, the Petitioners did in fact comply with the restraint provision of Order No. 445 by applying for leave to pursue their then-pending action for a three-judge court in the Middle District of Pennsylvania with respect to only ten specific abandonment orders. Their real quarrel, therefore, is with still another order of the Reorganization Court (Order No. 454, Reorganziation Trustee's Brief in Opposition, p. 7a), by which such leave was denied. The Petitioners do not allege that they have any direct and immediate interest in appealing to any three-judge court any of the various other abandonment orders of the Commission. On the contrary, see the statement at page 7 of the Petition:

> "The Commission's decision to allow the *10 abandonments* was entered under the provisions of the Interstate Commerce Act, and review of *its decision* must be in a statutory court composed of three judges. [emphasis added]"

III. The Suspension-Of-Operations Provision Of Order 445 Is Also Consistent With Prior Precedents.

The Trust Company concurs in the opposing briefs of the Protective Committee and the Reorganization Trustee both as to the correctness of the Reorganization Court's discretion in ordering suspension of the Debtor's operations in Pennsylvania and as to the mootness of any appellate proceedings touching this portion of the Order, now that the fact is not only an accomplished one* but also substantially confirmed by the Commission.

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* Petitioners' application for a stay was denied by Mr. Justice Stewart on March 27, 1972. (Petition for a Writ, etc., p. 6)

Clearly the Interstate Commerce Commission has a role to play in the process of freeing railroads (whether solvent or bankrupt) from improvident operations. 49 U.S.C. 1(18)-1(20); 11 U.S.C. 205(o).

In the case of abandonments affecting bankrupt and desperately deficit-ridden railroads, however, judicial deference to the Commission on questions of public interest may beg the ultimate question; since whenever continued operations of the railroad result in inexorable erosion of the estate, the decisive consideration must at some point become not what the public interest requires but rather who is going to pay for it, to wit:

> "whether the time is . . . foreseeable in the near future when the continued deficit operation . . . in the public interest at the expense of the creditors must be held to be a taking of their property without due process or just compensation, in violation of the Fifth Amendment. . . ." *In re New York, N.H. & H.R.R. Co.*, 289 F. Supp. 451, 454 (D. Conn. 1968) (Reorganization Case I).

The remedy of partial cessation which was granted by the order now in issue is in fact much milder (from the public's point of view) than the "constitutional right * * * to cease operation and liquidate" which was confirmed by the New Haven three-judge court, *N.Y., N.H. & H.R. Co., Bondholders' Committee* v. *United States*, 289 F. Supp. 418 (S.D.N.Y. 1968). Circuit Judge Friendly wrote:

> "We see no reason to question the validity of Justice Holmes" decision in Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323, forbidding the State of Louisiana to require a railroad to continue its deficit operation with no hope for profits in the foreseeable future. See also, Mora v. Mejias, 223 F.2d 814 (1 Cir. 1955); Railroad Commission v. Eastern Texas R. R., 264 U.S. 79, 85, 44 S.Ct. 247, 68 L.Ed. 569 (1924); Bullock v. State of Florida ex rel. Railroad Commission, 254 U.S. 513, 41 S.Ct. 193, 65 L.Ed. 380 (1921); cf. Pacific Telephone & Teleg. Co.

v. Tax Comm'n, 297 U.S. 403, 413, 56 S.Ct. 522, 80 L.Ed. 760 (1936). We cannot accept the argument that all this was changed by the addition of § 1 (18), requiring the Commission's consent to abandonement, to the Interstate Commerce Act by the Transportation Act, 1920, or by the enactment of § 77 of the Bankruptcy Act in 1933. These statutes were designed to assure orderly procedures and to afford methods that might avoid the ultimate solution; they were not intended to override constitutional guarantees, cf. In re Third Avenue Transit Corp., 198 F.2d 703, 707 (2 Cir. 1952), and would not be effective if they had been. [footnote omitted]" 289 F. Supp. at 440-441.

Even as a matter of simple statutory construction, courts have permitted cessation of services without prior Commission approval on the general theory that:

> "To 'abandon' within the context of the statute means to give up permanently, not merely to suspend operations. No Commission approval is necessary where the cessation of operations results not from the volition of the railroad but as a result of conditions over which the railroad has no control." *Myers* v. *Arkansas & Ozarks Ry. Corp.*, 185 F. Supp. 36, 41 (W.D. Ark. 1960) citing *Zirn* v. *Hanover Bank*, 215 F.2d 63 (2nd Cir. 1954).

If damage due to severe weather (as in *Myers*) or the exercise of creditors' statutory rights (as in *Zirn*) justify cessation of operations without awaiting the technicality of Commission certification, *a fortiori* the constitutional rights of the Debtor and its creditors should not be thwarted by technicality.

On appeal, the discretion, indeed the expertise, of a reorganization court is entitled to special deference. *New Haven Inclusion Cases, supra.*, 399 U.S. at 435; *Railroad Credit Corp.* v. *Ecker, supra.*, 152 F.2d at 421 (9th Cir.

1945); *Chicago & N. W. Ry. Co.* v. *United States*, 52 F. Supp. 65, 67 (N.D. Ill. 1943), *aff'd per curiam*, 320 U.S. 718 (1943). Admittedly, the judiciary has no apothecary's scale by which to measure the degree of confiscation sufficient to constitute a Fifth Amendment violation. A balancing of all factors known to the experienced Reorganization Court is all that can be required.

The Petitioners make no attempt to controvert the Reorganization Court's determination that the welfare of the Debtor's estate required a partial cessation of operations. Nothing in the record, certainly, induced the experienced and intimately knowledgeable Reorganization Court to paint a false dawn or see any brightness of light at the end of the tunnel, as it hypothesized in December, 1971, the situation on April 1 next. Quite the contrary, as late as October 26, 1971, the Reorganization Court said:

> "What bothers me, and bothers me very much, is the losses resulting from operations month after month. And I will not allow this condition to continue indefinitely. * * * I want to make it crystal clear to all concerned that I do not intend to sit on this bench and see the debtor's estate consumed by continued operating losses."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgments and opinions of the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A, 5a-8a) are not yet reported. The orders of the district court (Pet. App. A, 1a-4a) are not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on March 10, 1972. The petition for a writ of certiorari was filed on June 8, 1972. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a district court may, in the exercise of its bankruptcy jurisdiction, enjoin review in another forum of Interstate Commerce Commission orders relating to line abandonment applications filed by the debtor railroad company.

2. Whether a district court may, in the exercise of its bankruptcy jurisdiction, order the debtor railroad company to suspend operations on certain lines.

STATUTORY PROVISIONS INVOLVED

Section 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. 1 (18)-(20), Section 77(o) of the Bankruptcy Act, 11 U.S.C. 205(o), and Sections 1398 (a) and 2325 of the Judicial Code, 28 U.S.C. 1398 (a) and 2325, are set forth at Pet. App. B, 1b-4b.

STATEMENT

In March 1967, the Central Railroad Company of New Jersey ("C.N.J.") filed a petition for reorganization in the United States District Court for the District of New Jersey. From 1958 through 1971, C.N.J. had lost more than $100 million. The present trustee was appointed in January 1971. The railroad was at that time facing a severe liquidity crisis which threatened to cause the termination of all its operations.

The trustee dealt with this crisis by obtaining a $2,000,000 grant from the State of New Jersey and permission from the court, the United States Depart-

ment of Transportation, and the Interstate Commerce Commission, to issue up to $2,500,000 in federally-guaranteed trustee certificates under the Emergency Rail Services Act of 1970, Pub. L. 91-663, 84 Stat. 1975.[1] The trustee also developed a program calling for passenger and freight rate increases, negotiation of passenger contracts with the State of New Jersey, disposition or utilization of unproductive real estate, discontinuance of unprofitable coal-dock and marine lighterage activities, and the abandonment of all C.N.J. operations in Pennsylvania. The latter operations, which were unprofitable, were to be turned over to the Lehigh Valley Railroad, which operated parallel lines in Pennsylvania. Effectuation of this program would reduce C.N.J. operations to an area comprising six heavily populated and heavily industrialized northern New Jersey counties.

In May 1971, as a step in the implementation of this program, the trustee applied to the reorganization court for permission under Section 77(o) of the Bankruptcy Act, 11 U.S.C. 205(o), to file an application with the Interstate Commerce Commission for approval and authorization of abandonment of its lines and operations in Pennsylvania.[2] After notice

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[1] Only $1,500,000 of these certificates have actually been issued. The court in Order No. 445 authorized the trustee to issue the extra $1,000,000 in certificates in accordance with the terms of that Order.

[2] Abandonment of a few unprofitable branch lines in New Jersey was also sought.

and hearing, the court granted the trustee's request, and on May 25, 1971, he filed his application with the Commission. The Commission divided the application into 29 parts, representing different segments of C.N.J. lines, and on August 20, 1971, summarily approved the abandonment of ten of these segments, five in Pennsylvania and five in New Jersey, effective September 28, 1971.

The Commonwealth of Pennsylvania, which had appeared in the Commission proceedings, petitioned for reconsideration of the Commission's order.[3] On September 28, 1971, the Commission stayed its order pending its decision on the Commonwealth's petition for reconsideration. The Commission then conducted extensive hearings on the C.N.J. abandonment application. These hearings concluded December 14, 1971. On December 15, 1971, the Commission denied the petition for reconsideration, and its order approving the abandonments became effective January 4, 1972.

On December 20, 1971, the reorganization court issued Order No. 445, directing the trustee to suspend all C.N.J. operations in Pennsylvania by April 1, 1972, pending the Commission's final decision on the abandonment application (including all parts thereof), and enjoining all parties from instituting or maintaining in any other court any action affecting

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[3] Together with several labor organizations, the Commonwealth also filed suit under the Urgent Deficiencies Act, 28 U.S.C. 2321-2325, in the United States District Court for the Middle District of Pennsylvania, to set aside the Commission's order. That suit has in effect been stayed pending the disposition of this case.

C.N.J. operations in Pennsylvania. On January 11, 1972, the court issued Order No. 451, authorizing the trustee to abandon the ten segments covered by the Commission's order of August 24, 1971. The court refused to stay these orders pending appeal. Petitioners then prosecuted expedited appeals.

The district court's orders were affirmed *per curiam* by the court of appeals, which denied petitioners' applications for stay. Petitioners' applications for stay submitted to Mr. Justice Brennan, and by him referred to Mr. Justice Stewart, were denied on March 27, 1972.[4]

ARGUMENT

The district court's orders were a proper exercise of its bankruptcy jurisdiction. The petition presents no question warranting further review.

1. Contrary to petitioners' contention (Pet. 7-10), a reorganization court has jurisdiction to review Interstate Commerce Commission orders deciding abandonment applications filed by the trustee, and the court, to protect its review jurisdiction, may enjoin the parties from seeking review of such orders in another forum.[5] See *New Haven Inclusion Cases*, 399

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[4] In an order entered May 26, 1972, the Interstate Commerce Commission approved C.N.J.'s application to abandon all its lines and operations in Pennsylvania. This order is not yet effective.

[5] Petitioners urge (Pet. 9) that the C.N.J. abandonment application here should be considered as materially unconnected with the reorganization proceeding, contending that C.N.J.'s abandonment application is no different from the

U.S. 392; *Chicago & North Western Ry. Co.* v. *United States*, 52 F. Supp. 65 (N.D. Ill.), affirmed *per curiam*, 320 U.S. 718. To permit appeal from the Commission's orders to be taken to a district court unfamiliar with the reorganization would result in confusion, unnecessary expense, and excessive delay, the very evils which Congress has sought to eliminate in railroad reorganizations. As this Court noted in *New Haven Inclusion Cases, supra*, at 421:

> * * * the Commission was required to certify its proposal to the court as a prerequisite to judicial approval. § 77(d), 11 U.S.C. § 205(d). Injunctive intervention by the three-judge court would thus have disrupted an essential statutory phase of the New Haven reorganization.

Here, as in *New Haven Inclusion Cases*, the variety of issues and parties raises the possibility of multiple litigation in several district courts unless primacy is accorded a single forum. See 399 U.S., at 418-419 n. 50. See also *In re Penn Central Transportation Co.*, 329 F. Supp. 387, 390 (E.D. Pa.), affirmed, 446 F.2d 1109 (C.A. 3). Moreover, confining review to the reorganization court should not affect the outcome of the litigation: since Section 77(o) of the Bankruptcy Act incorporates Section 1(18) of the Interstate Commerce Act, the question of public convenience and

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abandonment application of a railroad not in reorganization. The reorganization proceedings and the abandonment are, however, intimately connected: the abandonment application originated in the reorganization court (see p. 3, *supra*), and the reorganization court must act on the Commission's final order pursuant to Section 77(o) of the Bankruptcy Act.

necessity may be reviewed by the reorganization court, and such a court would exercise the same scope of review as a three-judge court.

The power of a bankruptcy court to enjoin parties from litigation which would hamper exercise of its statutory responsibility or would otherwise interfere with exercise of its jurisdiction over the debtor is well established. 11 U.S.C. 11(a)(15). See *Continental Illinois National Bank* v. *Chicago, R.I. & Pac. R. Co.*, 294 U.S. 648, 675. See generally, 1 Collier, *Bankruptcy*, para. 2.60-2.62. Any delay engendered here by intrusion into the review process by a three-judge court unfamiliar with the C.N.J. reorganization might seriously hamper the reorganization court in exercising its statutory responsibility. The district court was therefore justified in restraining the litigants from proceeding in some other forum.

2. Petitioners also contend (Pet. 10-12) that a reorganization court lacks jurisdiction to order a temporary suspension of a portion of the railroad debtor's operations. However, a reorganization court may even order cessation of all operations, where further operations of the debtor at a loss would amount to a taking of property without compensation. *New Haven Inclusion Cases*, 399 U.S. 392, 490-492; *New York, N.H. & H. R. Co., Bondholders' Committee* v. *United States*, 289 F. Supp. 418 (S.D. N.Y.); *In re New York, N.H. & H. R. Co.*, 289 F. Supp. 451 (D. Conn.). In this case, the Commission has noted, in its order of May 26, 1972 (see note 4, *supra*), that:

> The overriding factor with which we are faced, is that since 1967, C.N.J. has been Debtor in Reorganization under the Bankruptcy Act before the United States District Court for the District of New Jersey. Its position has continuously deteriorated, as have other railroad[s] serving the New York Metropolitan area. C.N.J. now may be considered *in extremis*. During and since 1970, its losses have amounted to more than $1 million per month. Under the circumstances, some form of drastic remedial action became imperative [Opinion of the Commission, p. 105].

Thus, the reorganization court was within its authority in ordering a partial shutdown of C.N.J. operations where continuance of such operations for public convenience would involve an uncompensated taking of property.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1972.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 5a-6a) is not yet reported. The order of the district court (Pet. App. A, 1a-3a) is also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A, 10a-11a) was entered on March 10, 1972. The petition for a writ of certiorari was filed on June 8, 1972. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The major issue in this case warranting consideration by this Court is whether the court below erred in holding that a railroad reorganization court has jurisdiction to review an order of the Interstate Commerce Commission authorizing abandonment of a portion of the railroad's line, and in enjoining all parties from instituting or maintaining a suit for review of that Commission order in a three-judge district court convened in another district pursuant to the Urgent Deficiencies Act.

STATUTES INVOLVED

The statutes involved are Section 1(18)-(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-(20); Section 77(0) of the Bankruptcy Act, 11 U.S.C. 205 (0); and Sections 1398(a) and 2325 of the Judicial Code, 28 U.S.C. 1398(a) and 2325 (Pet. App. B, 1b-4b).

STATEMENT

The Central Railroad Company of New Jersey (CNJ) filed a petition for reorganization on March 22, 1967, in the United States District Court for the District of New Jersey (the reorganization court). On May 25, 1971, the Trustee of CNJ filed 30 applications with the Commission requesting authority to abandon 30 line segments under Sections 1(18) and 1(20) of the Interstate Commerce Act, 49 U.S.C.

1(18) and 1(20).[1] These applications include CNJ's entire Pennsylvania operations as well as certain of its New Jersey lines. By an order dated August 20, 1971, the Commission summarily authorized CNJ to abandon 10 of the 30 lines. The remaining applications were set for further proceedings before the Commission.[2]

Petitioners, who opposed the abandonment in the Commission proceeding, filed a complaint on September 24, 1971, in the Middle District of Pennsylvania seeking to enjoin and set aside the Commission's order authorizing the 10 abandonments. Before that suit could be prosecuted, however, the reorganization court, in response to a petition for instructions filed by the Trustee of CNJ, issued an order (Order No. 445) directing the Trustee to suspend all of CNJ's Pennsylvania operations by April 1, 1972, even if the abandonment applications were still pending before the Commission and further enjoining essentially all parties from instituting or maintaining any action affecting CNJ's Pennsylvania operations in any court other than the reorganization court.

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[1] The applications were docketed as F.D. No. 26659 and subs 1-29 thereunder.

[2] Of the remaining 20 applications, the Commission, in a decision served June 2, 1972, approved 13 and denied 5 such applications. CNJ had withdrawn 2 applications in their entirety. The matter is now pending before the Commission on petitions for reconsideration.

Petitioners' application to the reorganization court for leave to proceed in the Pennsylvania suit was denied, and the Pennsylvania suit has been continued pending this Court's decision herein. Thereafter, by order No. 451, the reorganization court authorized the Trustee to implement the 10 abandonments approved by the Commission.

On appeal, the Court of Appeals for the Third Circuit affirmed the orders of the reorganization court. Petitioners' applications for stay pending appeal were denied by the court of appeals, and by Mr. Justice Stewart on March 27, 1972.

ARGUMENT

The petition presents an important question of Federal court jurisdiction which is likely to recur in other railroad reorganization proceedings, and which appears to be in conflict with prior decisions of this Court as well as those of other lower Federal courts.

1. At the present time, twelve of the Nation's railroads are in reorganization proceedings in various district courts throughout the country. Several of the proceedings—including those involving the Penn Central,[3] the Reading,[4] and the Lehigh Valley[5]—are

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[3] *In the Matter of Penn Central Transportation Company,* Bankruptcy No. 70-347, E.D. Pa.

[4] *In the Matter of the Reading Company,* Bankruptcy No. 71-828, E.D. Pa.

[5] *In the Matter of Lehigh Valley Railroad Company,* Bankruptcy No. 70-432, E.D. Pa.

in courts located within the Third Circuit. The decision of the court below has already been cited by a major creditor in the New Hope and Ivyland reorganization proceeding, seeking an order directing the Trustee of that railroad to suspend operations,[6] and the issue of the reorganization court's power to review an abandonment order and to enjoin review by other courts can similarly be expected to arise in other reorganization proceedings. Plainly, this is a matter of sufficient importance to warrant plenary consideration by this Court.

2. The question presented is important to the lower Federal courts in defining their respective jurisdictions, and cannot be resolved without guidance from this Court. The reorganization court's orders are in no way binding on the three-judge district court in the Middle District of Pennsylvania and thus both courts *could* have proceeded simultaneously. The fact that the Pennsylvania court has stayed its hand here does not detract from the possibility that it could have acted and reached a different result than the reorganization court. See *New Haven Inclusion Cases*, 399 U.S. 392, 419 (1970).

3. The decision of the court below is in conflict with this Court's decision in *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134 (1946). In *Thompson*, this Court held that "[c]arriers being reorganized

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[6] *In the Matter of New Hope and Ivyland Railroad Company, Debtor*, Bankruptcy No. 70-324, E.D. Pa., Motion of Southeastern Pennsylvania Development Fund for Order Directing Trustee To Suspend Operations, filed August 1, 1972.

under § 77 of the Bankruptcy Act are not exempt from" the provisions of § 1(18) of the Interstate Commerce Act, which requires that no carrier may abandon all or any part of its operations unless and until the Commission has issued an order authorizing it to do so. (328 U.S. at 144). And, in language directly applicable to the case at bar, this Court emphasized that "[i]f the order of the Commission were challenged, its review could of course be had only in the manner provided by statute. See *El Dorado Oil Works* v. *United States*, 328 U.S. 12." (328 U.S. at 151, fn. 11). The "manner provided by statute" is, of course, that such orders are only "reviewable by a district court of three judges." (*El Dorado*, 328 U.S. at 19). Here, in contrast, the reorganization court has asserted jurisdiction to review the Commission's abandonment order, and has enjoined the parties from seeking review before a three-judge court, as provided by statute. Plainly, this is contrary to this Court's *Thompson* decision.

Other lower courts dealing with similar issues have consistently followed the rationale of this Court in *Thompson*, holding that orders of the Commission in cases involving passenger train discontinuances of a railroad in reorganization (which are analogous to abandonment cases) are subject to review only by a statutory three-judge court and not by the reorganization court. In *Commonwealth of Pennsylvania* v. *United States*,[7] a three-judge dis-

[7] Civil Action No. 70-1156, Western District of Pennsylvania, Memorandum Opinion Sur Interlocutory Injunction,

trict court in Pittsburgh denied a motion by the Penn-Central Transportation Company to transfer a passenger train discontinuance case to Penn-Central's reorganization court. And in *In re Penn-Central Transportation Company*, 446 F.2d 1109, 1113 (3rd Cir. 1971), the Third Circuit itself indicated that "matters relating to train discontinuance are not ordinarily heard by the reorganization court."

The Commission's decision authorizing 10 of the 30 line abandonments requested by CNJ was rendered exclusively under the provisions of the Interstate Commerce Act. Accordingly, judicial review of the Commission's decision must, as this Court held in *Thompson*, be before a three-judge district court in conformance with the statutory scheme for reviewing the transportation decisions of the Commission, and the court below was without jurisdiction to alter this mode of judicial review. Compare *Callaway* v. *Benton*, 336 U.S. 132, 142 (1949), where this Court observed that "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate . . . What it did give is exclusive jurisdiction of the debtor and its property wherever located."

Arguments that the decision of the court below is supported by *New Haven Inclusion Cases*, 399 U.S. 392; and *Chicago & North Western Ry. Co.* v. *United*

Conclusion of Law No. 3, dated October 12, 1970, *vacated as moot sub nom. Baker* v. *Pennsylvania*, 401 U.S. 902 (1971). That case was rendered moot by the passage of the so-called Railpax legislation during the litigation.

States, 52 F. Supp. 65 (N.D. Ill. 1943), affirmed *per curiam* 320 U.S. 718, are plainly in error. Those cases dealt with the reorganization court's exclusive jurisdiction to review the Commission's decisions on plans of reorganization; they did not involve review of other decisions of the Commission affecting the railroad, such as abandonment decisions.[8] With respect to abandonment of the debtor's line, § 77(0) of the Bankruptcy Act provides that the trustee shall initially determine what lines should be abandoned in the interest of the debtor's estate and shall present to the reorganization judge petitions for authority to abandon. The judge after notice and hearing may:

> upon order . . . authorizing any such abandonment or sale, but only with the approval and authorization of the Commission *when required by the Interstate Commerce Act* . . . (emphasis added)

The quoted portion of § 77(0) clearly shows that: (1) Congress specifically did not grant any exception to a reorganizing railroad so far as abandonment of line is concerned; and (2) the procedure to be followed in the abandonment proceeding is as "required by the Interstate Commerce Act." Properly read, § 77(0) provides that the trustee and the re-

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[8] In the present case, the Commonwealth of Pennsylvania filed a motion with the Commission to consolidate the CNJ plan of reorganization and its abandonment applications. That motion was opposed by the Trustee of CNJ and denied by the Commission.

organization court should be "concerned only with the economic effect of the abandonment on the debtor's estate and reorganization, and that questions of the effect on public interest are to be left to the Interstate Commerce Commission." *In re Boston and Maine Corporation*, 317 F. Supp. 1249, 1252 (D. Mass. 1970); and *In re Fonda, J. & G.R. Co.*, 95 F. 2d 397, 400 (2nd Cir. 1938). Accordingly, questions of public interest, which pervade an application to abandon rail lines, are to be considered and reviewed under the substantive standards of the Interstate Commerce Act and the procedural scheme of the Urgent Deficiencies Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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